

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 34276

PRESTON GOODEN, ASSESSOR OF BERKELEY COUNTY

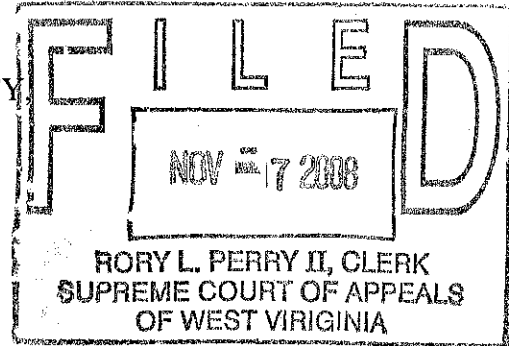
Appellant,

v.

IN RE:

TAX ASSESSMENT AGAINST THE PURPLE
TURTLE, LLC, JOSEPH ATKINS AND DANA
GRABINER, MARY A. MELNYK, LINDA A.
LLOYD, RYAN MCCARTHY AND ERICA B
PATTHOFF, DAVID SPRINGER AND JUDITH
LEITNER SPRINGER, JOSEPH L. MCNAMARA
AND DONNA B. MCNAMARA, GWENDA A.
GLESMAN AND PAUL R. SCRIBNER,
WILLIAM W. DONAHOE AND WENDY JONES
DONAHOE, KENNETH R. RETZIG
AND ELIZABETH D. RETZIG, TIMOTHY
D. REITZIG, TIMOTHY YATES AND
GENEVIEVE YATES,

Appellees



From the Circuit Court of
Berkeley County, West Virginia

Civil Action No. 06-C-198 and
07-C-247

The Honorable David Sanders, Judge

APPELLEES' BRIEF

Kenneth J. Barton, Jr. (W.Va. Bar #6044)
M. Dawn Alexander (W.Va. Bar #8722)
Steptoe & Johnson PLLC
1250 Edwin Miller Boulevard
Suite 300
P.O. Box 2629
Martinsburg, WV 25402-2629
(304) 263-6991

Counsel for Appellees

TABLE OF CONTENTS

| | |
|--|----|
| I. Introduction | 1 |
| II. The Kind of Proceeding and Nature Of the Ruling In the Ruling In The Lower Tribunal..... | 1 |
| III. Statement of Facts..... | 1 |
| A. Proceedings Below..... | 1 |
| B. Brief History of Facts | 2 |
| IV. Standard of Review..... | 5 |
| V. Response to Assignments of Error..... | 5 |
| VI. Points and Authorities Relied Upon | 6 |
| VII. Discussion Of Law and Argument | 7 |
| A. The Lower Court Did Not Err in Denying the Assessor's Motion to Dismiss the Appeal of the 2006 and 2007 Tax Assessments Based on the "'Failure of the Petitioners" to "Perfect Their Appeal" | 7 |
| B. The Lower Court Did Not Err in its Application of the Standard of Review of the Decision of the Berkeley County Commission's Decision Affirming the Proposed Assessment | 14 |
| 1. Did the Court Have the Complete Record Before it at the Time it Rendered its Decision? | 16 |
| 2. Purple Turtle Group Demonstrated that the Law's Requirements Concerning the Valuation and Taxation of Property Were Not Met..... | 19 |
| 3. The West Virginia Constitution Requires that Taxation be "Equal and Uniform," That Taxes be Levied "in Proportion" to a Property's Value, and that the Value of Property Must Be Ascertained in Accordance with the Law | 20 |
| 4. The "True and Actual," or "Fair Market" Value of Property is Not Always Reflected in its Sale Price | 21 |
| 5. How Does West Virginia Ensure that the "True Value" of Property is Ascertained | 22 |
| 6. The Assessments Did Not Reflect their True, "Fair Market," Value and Violated West Virginia Law | 24 |

| | |
|------------------------|----|
| VIII. Conclusion | 28 |
|------------------------|----|

I. Introduction

This appeal is an attempt by the Appellant, the Assessor ("Assessor") of Berkeley County, West Virginia to persuade this Court to ignore the substantive elements of this case and elevate form over substance to rule against the taxpayers who appealed the assessments on their one acre lots in a subdivision known as Broomgrass. The Assessor argues that the Circuit Court's decision should be overturned because the original filing by the taxpayers was procedurally deficient because the record was not attached to the appeal and presented to the Court within thirty days and/or on the basis that the Circuit Court employed the wrong standard of review in this case. Appellees (a collection of individuals referred to herein as "Purple Turtle Group") believe that the procedural deficiency complained of is, at most, harmless error and that the Circuit Court employed the correct standard of review in this case.

II. The Kind of Proceeding and Nature of the Ruling in the Lower Court

Purple Turtle Group members are property owners in a subdivision known as Broomgrass located in the Gerrardstown Tax District in Berkeley County, West Virginia. They filed a protest of the 2006 and 2007 assessments of their property with the Berkeley County Commission sitting as a Board of Equalization and Review ("Board"). After considering the arguments and materials presented by the parties, the Board of Equalization and Review affirmed the proposed assessments for 2006 and 2007 without written opinion. Purple Turtle Group members filed timely appeals of the Board's decisions in both 2006 and 2007, but did not attach the record of the proceedings to those appeals within thirty days. On appeal to the Circuit Court, the Circuit Court found that the failure to attach the record to the appeal and attach it within thirty days was not fatal to Purple Turtle Group's appeals of the Board's decisions and, by the time the Circuit Court ruled in favor of Purple Turtle Group, it had all of the written record before it.

III. Statement of Facts

A. Proceedings Below

1. Purple Turtle Group filed an appeal of the 2006 Tax Assessment on or about March 24, 2006.
2. On or about April 7, 2007, the Assessor filed a Motion to Dismiss Appeal.

3. After responsive memoranda had been filed by the parties, the Circuit entered an Order on March 15, 2007 denying the Assessor's Motion to Dismiss Appeal.
4. On or about March 7, 2007 Purple Turtle Group filed a Motion for Leave to Amend Appeal to Consider the 2007 Tax Assessment.
5. On or about March 22, 2007, the Purple Turtle Group filed an appeal of the 2007 Tax Assessment.
6. On or about April 11, 2007, the Assessor filed a Writ of Prohibition.
7. On or about April 17, 2007 the Circuit Court granted the Purple Turtle Group's Motion to Amend Appeal.
8. On or about April 26, 2007 the Assessor filed a Motion to Dismiss Appeal.
9. On May 10, 2007, the Supreme Court of Appeals of West Virginia refused the Writ of Prohibition.
10. On or about July 11, 2007, Purple Turtle Group members filed a Motion for Summary Judgment.
11. After responsive memoranda had been filed by the parties, the Circuit entered an Order on November 28, 2007 granting the Purple Turtle Group's Motion for Summary Judgment.

B. Brief History of the Facts

On or about February 16, 2006, Purple Turtle Group filed a protest of proposed assessments on their lots with the Berkeley County Commission acting as a Board of Equalization and Review ("Board"). The Board held a hearing concerning the protest at which time both the Assessor and Purple Turtle Group presented arguments. The Board subsequently upheld the Assessor's assessments, but did not issue a written opinion. Purple Turtle Group filed an appeal of the Board's decision on March 24, 2006. On or about February 27, 2007, Purple Turtle Group filed a protest to the 2007 proposed assessment with the Board, which again upheld the decision of the Assessor. Purple Turtle Group members appealed this decision on or about March 22, 2007.

Before the Board, Purple Turtle Group argued that there were sixteen (16) parcels at issue and these parcels were subdivided from a tract known for tax purposes as Tax Map 19, Parcel 8 in the Gerrardstown Tax District. The entire tract consisted of approximately three hundred twenty (320) acres. For the year 2005, the total assessed value on the entire three hundred twenty (320) acre parcel was Forty Thousand Nine Hundred and 00/100 Dollars (\$40,900.00) or One Hundred Twenty-Eight and 00/100 Dollars (\$128.00) per acre. Taxes payable on that land were Two Hundred Ninety-One and 64/100 Dollars (\$291.64) or Zero and 91/100 Dollars (\$0.91) per acre. Purple Turtle Group argued that after the sixteen individual one-acre lots were broken out for development, the tax assessment changed dramatically. In 2006, the proposed assessed value on the sixteen (16) lots was Three Million Seventy-Two Thousand and 00/100 Dollars (\$3,072,000.00) or One Hundred Ninety-Two Thousand and 00/100 Dollars (\$192,000.00) per acre. The total estimated 2006 taxes on these parcels have increased to Forty-Four Thousand Three Hundred Fifty-Two and 00/100 Dollars (\$44,352.00) or Two Thousand Seven Hundred Seventy-Two and 00/100 Dollars (\$2,772.00) per acre, an increase in excess of three hundred thousand percent (300,000%). Appraisals and taxes for the 2007 year were comparable to those for 2006.

The appraisal value of the sixteen one-acre lots was calculated by the Assessor to be \$192,000.00 each. According to a letter from the Berkeley County Assessor's Office dated February 16, 2006, the 1 acre lots were appraised "based on the average sale price of \$192,000.00 and the remaining 304 acres are valued at a reduced farm agricultural price per acre." See Exhibit D to Opposition to Motion and Memo in Support of Motion to Dismiss Appeal, Appendix for Civil Action No. 07-C-247, pp. 135-136. The letter noted the concern of the Purple Turtle Group that the appraisals of the one acre lots reflected a 300,000 % increase in market value, observing that in 2005, all the acreage was valued with farm rates at \$40,900.00 and that in 2006, the remaining farmland was valued at \$41,000.00 but the Assessor argued that there was no increase in the market value "because the lots created a new neighborhood for the 2006 tax year." *Id.* The Assessor's letter indicated that "[b]ecause of its uniqueness, Broom Grass (sic) does not compare to other subdivisions, so we appraised them (the lots) at the market they created." *Id.*

Purple Turtle Group provided to the Board provided an appraisal by an independent appraiser, The Hawthorne Group, that had been performed in April, 2005 when the Berkeley County Farmland Protection Board sought an appraisal of land that was then the subject of a possible conservation easement. That appraisal concluded that the value of the lots at issue was \$40,000 each. The appraisal recognized the difference in value between the 16 buildable lots and the land that was to be made subject to a conservation easement; the appraisal of the 16 lots at issue in this case used six sales of similar properties in the immediate area in the Gerrardstown District that had been sold in late 2004 and early 2005 as a basis of comparison.

The sizes of the lots used by the independent appraiser for comparison purposes ranged from 1.62 to 2.5 acres. The unit prices for those lots ranged from \$29,787.00 to \$45,000.00 per acre and the unadjusted mean value per acre for the six sales was \$39,304.00 per acre. Based on those six sales, the appraisal estimated the value of each of the 16 lots at issue to be approximately \$40,000.00 per lot.

Purple Turtle Group argued that the lots used for comparison purposes in the appraisal were similar to those in Broomgrass and had similar topography, were located in the same approximate area and general district, and that the opportunities and advantages of the surrounding area were the same. It also presented arguments to the Board that in basing his appraisal and assessments of the lots at issue on their average sale price, without taking into consideration that the sales prices of the lots were set above fair market value because they incorporated not only the value of the lots, but the value of the farmland and the costs to develop it into an organic farm, the Assessor was actually taxing Purple Turtle Group members at a rate far greater than fair market value and making them subject to double taxation. See Exhibit A to Opposition to Appellee's Motion to Dismiss Appeal of the 2006 Tax Assessment, Complainant's Protest of the 2006 Assessment (Appendix for Civil Action No. 06-C-198, pp. 55-148).

The Board, without a written opinion, affirmed the assessments and appraisals made by the Assessor and, as noted above, Purple Turtle Group appealed the Board's decision in both 2006 and 2007. At the Circuit Court, the Assessor argued that the Purple Turtle Group members' appeal of

the assessments on their property should be dismissed because the record of the proceedings before the Board were not attached to Purple Turtle Group members' appeals and not provided within thirty days. Although the record was not filed with their appeals or within thirty days of the Board's decisions, the Court did have the complete record before it prior to rendering its opinion dated November 28, 2007. See Order Granting Summary Judgment to Appellants (Appendix for Civil Action No. 6-C-98, pp. 463-470). The Circuit Court held that the failure to attach the record to the appeal and within thirty days was not fatal to Purple Turtle Group's cause and held that the assessments of Purple Turtle Group members' properties violated the law.

The Assessor has presented no valid reason to disturb the Circuit Court's rulings. The failure to attach the record to the appeal within thirty days was harmless error and the Circuit Court properly exercised its judgment, employed the correct standard of review, and rendered rulings consistent with the law.

IV. STANDARD OF REVIEW

A Circuit Court's entry of summary judgment is reviewed de novo. Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, Syl. pt. 1 (1994). Further, "questions of law and statutory interpretations are subject to de novo review." Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264, syl. pt. 1 (1995). See Belt v. Rutledge, 175 W.Va. 28, 330 S.E.2d 837 (1985) ("[i]f the question on review is one purely of law, no deference is given and the standard of judicial review by the courts is de novo.") Although factual findings are reviewed under the clearly erroneous standard, mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewed de novo." Burnside, 460 S.E.2d at 265.

V. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The lower court correctly determined that the failure to attach the record to the appeal and have it before the court within thirty days was harmless error.

2. The lower court did not err in its application of the standard of review of the Board's decisions; the correct standard of review for the court to employ was the "clear and convincing"

standard of review as to questions of fact and, as to questions of whether Board decisions violated constitutional or statutory law, the correct standard of review to employ was the *de novo* standard of review.

VI. POINTS AND AUTHORITIES RELIED UPON

CASES

| | |
|--|-------------|
| <u>Allegheny Pittsburgh Coal Co. v. County Commission of Webster County</u> , 488 U.S. 336, 409 S.Ct. 633, 102 L.Ed.2d 688 (1989)..... | 32 |
| <u>Belt v. Rutledge</u> , 175 W.Va. 28, 330 S.E.2d 837 (1985)..... | 8 |
| <u>Burnside v. Burnside</u> , 194 W.Va. 263, 460 S.E.2d 264 (1995)..... | 8, 20 |
| <u>Crouch v. County Court of Wyoming County</u> , 116 W.Va. 476, 477, 181 S.E. 819, 819 (1935) | 25,30 |
| <u>Eastern American Energy Corp. v. Thorn</u> , 189 W.Va. 75, 78, 428 S.E.2d 56, 59 (1993)..... | 25 |
| <u>Frymier- Halloran v. Paige</u> , 193 W.Va. 687, 485 S.E.2d 780 (1995)..... | 18 |
| <u>Holstein v. Norandex, Inc.</u> , 194 W.Va. 727, 461 S.E.2d 473 (1995) | 16 |
| <u>In Re 1975 Tax Assessments Against Oneida Coal Co.</u> , 178 W.Va. 485, 487-88, 360 S.E.2d 562-563 (1987) | 25 |
| <u>In Re Shonk Land Co.</u> , 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974)..... | 30, 32 |
| <u>In Re: Stonestreet</u> , 147 W.Va. 719, 131 S.E.2d 52 (1963)..... | 14-16 |
| <u>In re Tax Assessment Against American Bituminous Power Partners, L.P.</u> , 208 W.Va. 250, 254, 539 S.E.2d 757, 761 (2000) | 18 |
| <u>Killen v. Logan County Commission</u> , 170 W.Va. 602, 295 S.E.2d 689 (1982) | 25-26 |
| <u>Kline v. McCloud</u> , 174 W.Va. 369, 372, 326 S.E.2d 715, 718 (1984)..... | 25-26,30,32 |
| <u>Painter v. Peavy</u> , 192 W.Va. 189, 451 S.E.2d 755 (1994)..... | 8 |
| <u>Rawl Sales and Processing Co. v. County Commission</u> , 191 W.Va. 127, 443 S.E.2d 595 (1994)..... | 14-16 |
| <u>Rose v. Fewell</u> , 170 W.Va. 447, 449, 294 S.E.2d 434, 436 (1982)..... | 26 |
| <u>State v. Allen</u> , 65 W.Va. 335, 64 S.E. 140 (1909)..... | 23 |
| <u>Tug Valley Recovery Center, Inc. v. Mingo County Commission</u> , 164 W.Va. 94, 112, 261 S.E.2d 165, 175 (1979)..... | 20 |

RULES

| | |
|---|----|
| Rule 61 of the West Virginia Rules of Civil Procedure | 17 |
|---|----|

STATUTES

| | |
|--|-----------|
| West Virginia Code § 11-1C-1 | 25, 31 |
| West Virginia Code § 11-3-1 | 24, 32 |
| West Virginia Code § 11-3-25 | 11-15 |
| West Virginia Code § 29A-5-4 (g) | 18-19 |
| West Virginia Code § 58-3-1 | 13 |
| West Virginia Code § 58-3-2 | 13 |
| West Virginia Code § 58-3-4 | 13-15, 17 |

CONSTITUTIONAL PROVISIONS

| | |
|---|-------|
| Article 10, section 1 of the West Virginia Constitution | 24-25 |
|---|-------|

VII. DISCUSSION OF LAW AND ARGUMENT

A. The Lower Court Did Not Err in Denying the Assessor's Motion to Dismiss the Appeal of the 2006 and 2007 Tax Assessments Based Upon the Failure of the Property Owners to Perfect Their Appeal

The Assessor's argument that the lower court erred in denying his Motion to Dismiss the Appeal of the 2006 and 2007 assessments is based on the idea that Appellees' failure to submit the record of the proceedings before the Board of Equalization and Review to the Court within thirty days should have proven fatal to their appeals. In support of this position, the Assessor makes two policy arguments. First, he asserts that the Court needs a copy of the original record to make a decision, a point Appellees do not deny. Second, he asserts that "[t]he legislature has the duty to determine the procedural process of protesting tax assessments and have (sic) required that the record be filed with the Circuit Court. West Virginia Code §11-3-25." See Appellant's Brief p. 12. Appellees agree that the legislature has required that the record of an appeal be filed with the Circuit Court. Neither of these arguments, however, explain why the failure to file the record of proceedings before the Board of Equalization and Review "**in thirty days**" should preclude a

taxpayer who files an appeal within thirty days from having his appeal considered if the Court has the record before it prior to rendering its decision.

The Assessor argues that "[w]hen it appears upon review of the Court that the Petition, though presented within the thirty-day period, was not accompanied by the original record of the proceeding in the County Commission and that no record of such proceeding was filed in the Circuit Court **within the limitation of thirty days prescribed by West Virginia Code §11-3-25**, the appeal applied for must be refused by the Circuit Court." Appellant's Brief p. 11 (emphasis added).

Before Purple Turtle Group addresses any other point, it must correct the fallacy that West Virginia Code §11-3-25 requires that the record be filed in the Circuit Court in thirty days; it indicates only that an appeal must be filed in that time period. The Assessor concedes that Purple Turtle Group's appeals were filed within thirty days of the decisions rendered by the Board. He argues, however, that the legislature has the duty to determine the procedural process of protesting tax assessments and has set forth the process to be followed in West Virginia Code § 11-3-25.

West Virginia Code § 11-3-25 specifies that "[a]ny person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation. . . may, at any time up to thirty days after the adjournment of the county court, apply for relief to the circuit court of the county." The same statute later states that "the party desiring to take such appeal shall have the evidence taken at the hearing of the application before the county court." Id.

Purple Turtle Group followed the statute's requirements insofar as appealing the valuation of their lots. Purple Turtle Group applied for relief in the Circuit Court of Berkeley County within thirty days as the statute required. West Virginia Code § 11-3-25, which specifically concerns appeals of land assessments, requires only that the party desiring an appeal submit the record from the appeal before the Board of Equalization and Review to the circuit court; it is silent as to the time-frame in which it must be submitted. It is not at all clear how any party can be prejudiced if the record is before the court for its review before it renders a decision, whether the record is submitted to the Court within 30 days, or if it is submitted 31 days later or beyond. After all, the

opposing party is on notice as to the intent to appeal and both the County Commission and the Assessor are aware of what the record held. If, as the Assessor states, "[t]he prejudice is not that the Assessor is unaware of the evidence presented to the Board of Equalization and Review but that the Court does not have the transcript or record to review in making its determination concerning the appeal," then the fact that a court receives the record prior to rendering its decision is all that matters - - not that it had the record months before it ever reviewed the matter. See Appellant's Brief p. 12. As will be discussed below, in this case the record is clear; the materials presented to the Board by both sides were submitted to the Court months before it rendered a decision.

As noted above, the requirement that the record before the Board of Equalization and Review be filed with a reviewing court within thirty days cannot be found in West Virginia Code § 11-3-25, the statute that specifies how an aggrieved taxpayer should appeal an erroneous assessment. The Assessor argues, however, that when West Virginia Code §§ 11-3-25 and 58-3-4 are read in conjunction with one another, it is clear that the record must be filed in thirty days.

Before delving into W.Va. Code § 58-3-4 itself, which also has no express requirement that the record be filed "within thirty days," it is important to explore the statutes related to it. West Virginia Code § 58-3-1 discusses a variety of circumstances in which an appeal shall lie to the circuit court from the "final order of the county commission." An aggrieved taxpayer's appeal is not among the causes listed, unless one relies on West Virginia Code § 58-3-1 (g), which states that an appeal shall lie to the circuit court from the final order of a county commission "in any other case by law specially provided." West Virginia Code § 58-3-2 indicates that "[i]n any case where there may be an appeal under the preceding section and the manner of the appeal **is not otherwise specially provided by law**, the procedure shall be controlled by the provisions in the following sections of this article; and in any case where the manner of appeal is otherwise specially provided, the provisions in the following sections of this article shall apply and control the procedure to the extent that they are applicable and not inconsistent with special provisions." *Id.* (emphasis added).

It appears to Appellees that West Virginia Code § 11-3-25 does "specially provide" the manner in which an appeal against an erroneous tax assessment is to be made and it followed the

procedure laid out by that statute. It filed its appeal within thirty days. The requirement upon which the Assessor relies for his argument that Purple Turtle Group's appeal was procedurally, and therefore, fatally, flawed, is found only by combining W.Va. Code § 11-3-25 with W.Va Code § 58-3-4. In its entirety, West Virginia Code § 58-3-4 states:

In any case in which an appeal lies under section one of this article on behalf of a party to a controversy in a county court, such party may present to the circuit court of the county in which the judgment, order or proceeding complained of was rendered, made or had, or in the vacation of such court, to the judge of such court, the petition of such party for an appeal. **Such petition shall be presented within four months after such judgment, order or proceeding was rendered, had or made,** and shall assign errors. It **shall be accompanied by the original record of the proceeding** in lieu of a transcript thereof. Such original record shall be understood as including all papers filed in the proceeding, certified copies of all orders entered in the proceeding, copies of which are not in the files, and all matters included in bills of exceptions, or certificates in lieu thereof, as provided in section three of this article. The record may likewise include and the court may consider an agreed statement of facts, and, in case the testimony in the proceeding below was not stenographically reported and preserved, a certificate of facts made by such commissioners, or a majority of them.

Id. (emphasis added).

Appellees believed that West Virginia Code §11-3-25 did "specially" provide how to appeal an assessment believed to be erroneous, a particularly likely interpretation of the statute since West Virginia Code § 58-3-4 contradicts West Virginia Code §11-3-25 by requiring that petitions for appeal be filed within "**four months** after such judgment, order or proceeding was rendered, had or made" rather than within thirty days. Quite simply, a natural reading of West Virginia Code §58-3-4, with its requirements that directly contradict some of those set forth in West Virginia Code §11-3-25, only serves to reinforce the idea that the manner of appeal for a tax assessment was "otherwise specially provided by law" in W.Va. Code § 11-3-25 and that W.Va. Code § 58-3-4, with its requirement that the final record accompany the appeal, was not meant to be applied.

As the Assessor points out, the idea that W.Va. Code § 11-3-25 and W.Va. Code § 58-3-4 should be read in conjunction with one another stems largely from two cases: In Re: Stonestreet, 147 W.Va. 719, 131 S.E.2d 52 (1963) and Rawl Sales and Processing Co. v. County Commission, 191 W.Va. 127, 443 S.E.2d 595 (1994). It is undeniable that the Stonestreet case asserts that W.Va.

Code § 11-3-25 and § 58-3-4 must be read in conjunction with one another and that it indicates that when a petition is not accompanied by the original record of the proceeding in the county court, the appeal applied for must be refused. In Stonestreet, an appeal was made within thirty days, but the written transcripts of the proceedings were not available within that thirty day period. Although the unavailability of the transcript was wholly beyond the control of the petitioners, the court in Stonestreet nevertheless found that the failure to submit the transcript with the appeal foreclosed any consideration of it by the Court.

By 1994, however, at least one justice on this Court had grown concerned that notions of fairness and justice were being lost as the failure to comply with the procedural letter of the law was being used to prevent taxpayers from receiving any substantive review of even the most egregious actions. In the Rawl case, the dissent railed against elevating form over substance and relying on the failure to meet procedural and technical requirements of West Virginia Code § 58-3-4 in conjunction with W.Va. Code § 11-3-25 to deny those trying to appeal tax assessments an opportunity to have the merits of their appeal heard. As the dissenting justice noted, the emphasis on form over substance in Rawl was "particularly ironic because the form emphasized, namely the procedure for appealing tax assessments, is probably the least competent of any similar procedure in the entire Code." Rawl, 191 W.Va. at 132. He noted with alarm that "[t]ogether these appeal requirements substantially bar most appeals to the circuit court of tax assessments made by the county commission!" Id.

As the dissent in Rawl observed, aggrieved taxpayers seeking review of tax assessments are probably at a greater disadvantage than any other type of appellant. The initial body hearing their appeal, the Board, has an interest in collecting as much revenue as possible and has an innate conflict of interest. Prior to that hearing, no discovery or depositions take place. Aggrieved taxpayers only know what materials the Board reviewed in arriving at its decision if (1) the Board refers to them at the hearing; (2) the Board refers to them in a written decision; (3) the aggrieved taxpayers are provided the material submitted to the Board by the Assessor or (4) the taxpayers obtain the materials pursuant to a request for them AFTER the Board has decided against

them. When (and indeed whether) they can even get the record within thirty days after the ruling against them is wholly dependent on the responsiveness of the Board or the Assessor; in this case, Purple Turtle Group eventually obtained the materials provided to the Board by the Assessor from the Assessor.

If the interpretation given to the law by the Court in Stonestreet continues to be strictly applied, any Board will be able to thwart taxpayer efforts to seek review of a Board's decision simply by refusing to provide the materials relied on by the Board to make its decision. In the unlikely event that a court reporter was present for a hearing before a Board, any failure to obtain the transcript within thirty days, regardless of whether the failure is beyond the control of the taxpayers or not, will also prove fatal to a taxpayer seeking review of a Board's decision.

Although when read alone, the decisions in Stonestreet and Rawl appear fatal to Purple Turtle Group's cause, Purple Turtle Group believes that more recent decisions by this Court indicate that it is no longer willing to elevate form over substance or allow substantive rights of citizens to be ignored because of harmless errors of form. A year after Rawl, in Holstein v. Norandex, Inc., 194 W.Va. 727, 461 S.E.2d 473 (1995), this Court appeared to have misgivings about the idea of elevating procedural rules above substantive issues. In Holstein, the appellee contended that an appeal should be dismissed because the appellant did not designate the record within thirty days of the dismissal of a defendant. Id. at fn. 2, p. 729. In considering the viability of this claim, the Holstein Court indicated that the alleged failure to timely designate the record was harmless and not prejudicial to the substantial rights of the appellees. Id. Moreover, the Holstein Court suggested that dismissing the appeal for failure to timely designate the record would be a "classic example of placing form over substance, a procedure historically criticized and routinely rejected by this Court." Id. (internal citations omitted).

While the Holstein case did not involve the particular statutes at issue, the principle involved appears to be the same: the danger of elevating form over substance must be battled so that the merits of cases can be heard. After all, the failure to attach the record within thirty days does not prejudice anyone unless the Court renders its decision without having the entire record before it.

The Court can request the record at any time - - and if any party believes that the court does not possess the entire record, it can provide it. There is no reason to treat taxpayers any differently than the parties in Holstein were treated. Purple Turtle Group did fail to attach the record within thirty days, but the entire record was before the Court before it rendered its decision. The error relied on by the Assessor is a harmless one, but is being used by the Assessor to try to ensure that the Circuit Court's decision cannot stand. If even the most harmless of errors is enough to prevent a party from receiving a substantive review of their claims, then taxpayers will rarely be able to have their petitions reviewed by a circuit court, much less hope for success. In any context other than tax appeals, it is difficult to imagine harmless error such as this even meriting serious argument. Rule 61 of the West Virginia Rules of Civil Procedure, for instance, makes it clear that "[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Under Rule 61, any error in allowing the record to be submitted over 30 days after the appeal was filed would be deemed harmless error insufficient to provide grounds for setting aside the court's verdict. According to the Assessor, however, in tax appeals, timing truly is everything. Appellees made multiple arguments about the problems with the assessments made on their properties; arguments that ultimately moved the Circuit Court to overturn the Board's decision. If the Assessor's argument that none of them can be considered because the record was not submitted to the Court in thirty days is accepted, it is not only the Appellees who lose; everyone who believes that our legal system should function in a manner that prefers substance over form and fairness over technicality does.

Clearly, when a right as fundamental as that of fair taxation is at stake, the need to reject placing form over substance, as this Court has in so many other situations, is at its greatest. Taxpayers lack the protections that civil litigants normally have. They have no opportunity to

engage in discovery or depose the Assessor. Court reporters are not normally present at Board of Equalization and Review hearings. The Board need not issue any written findings of fact or conclusions of law. The parties find out what one another has to say when they are standing before the Board. If written materials are provided to the Board by the Assessor, parties may or may not get a copy of them, even after the hearing. West Virginia Code § 58-3-4 suggests that “in case the testimony in the proceeding below was not stenographically reported and preserved, a certificate of facts made by such commissioners, or a majority of them” can be included as part of the record – but such a certificate can only be included if it exists. Much of what happens before the Board consists of oral argument, but with no transcript of the proceedings, arguments about what evidence was presented to the Board inevitably arise.

Given these facts, and more recent rulings by the Court that express a reluctance to place form over substance, Purple Turtle Group prays that this Honorable Court find that the failure to submit the record before the Board to the Court within 30 days is harmless error and that it will not grant the Assessor’s appeal and find that the lower court erred on this basis.

B. The Lower Court Did Not Err in its Application of the Standard of Review of the Decision of the Berkeley County Commission’s Decision Affirming the Proposed Assessment

Appellees agree with the Assessor that it is a general rule that valuations for tax purposes fixed by an assessing officer are presumed to be correct and that the burden of showing an assessment to be erroneous by clear and convincing evidence is on the taxpayer. See In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 254, 539 S.E.2d 757, 761 (2000). However, a circuit court’s review is not limited solely to determining whether a challenged property review is supported by substantial evidence; it is also to determine whether the results of a challenged property review are “otherwise in contravention of any regulation, statute, or constitutional provision.” Id.

The Assessor is careful to avoid any suggestion that a circuit court may review a decision by the Board to see if it contravenes any regulation, statute, or constitutional provision, perhaps

because if he were to acknowledge that fact, he would also have to acknowledge that while a circuit court reviews an assessment to determine if an aggrieved taxpayer has presented clear and convincing evidence that it was erroneous, in questions involving the violation of a statute, regulation, or constitutional provision, the court is to use the *de novo* standard of review.

The Assessor notes that this Court has recognized that a judicial review of a decision of the Board is limited to the same scope permitted under West Virginia Code § 29A (West Virginia's Administrative Procedures Act). See Appellant's Brief p. 14, citing Frymier- Halloran v. Paige, 193 W.Va. 687, 485 S.E.2d 780 (1995). He cites W.Va. Code § 29A-5-4 (g)(5) and § 29A-5-4 (g)(6) as the guidelines to be used by a circuit court in determining whether to reverse, modify, or vacate an order of the Board. He argues that a court can take such actions if the substantial rights of the Petitioner(s) have been prejudiced because the administrative findings, inferences, conclusions, decisions, or orders of the Board are:

- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

West Virginia Code § 29A-5-4 (g)(5) and § 29A-5-4 (g)(6) .

Notably absent from the Assessor's discussion are the first four reasons listed in W.Va. Code § 29A-5-4 (g) (1) - (4) to be used as guidelines by a circuit court in determining whether to reverse, modify, or vacate an order of the Board. These sections provide that a court shall reverse, vacate, or modify the order or decision of the agency (Board) if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions, or orders of the Board are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other clear error of law.

W.Va. Code § 29A-5-4 (g)(1) - (4).

Appellees presented ample evidence to the Board to demonstrate that the assessments were in violation of constitutional and statutory provisions - - and, to the extent the questions raised were about whether the assessments were made in violation of such provisions, the Court was meant to employ a *de novo* standard of review. Questions of fact raised by the Appellees required that the Court employ a clear and convincing standard, mixed questions of law and fact that required the consideration of legal concepts and involved the exercise of judgment about the values underlying legal principles were to be reviewed under a *de novo* standard of review as well. See Burnside v. Burnside, Syl. Pt. 1, 194 W.Va. 263, 460 S.E.2d 264 (1995).

1. Did the Court Have the Complete Record When It Rendered its Decision?

Unfortunately, no transcript of the hearings before the County Commission sitting as the Board of Equalization exists. No court reporter attends those hearings and they are rather informal affairs. Evidently, this is not uncommon, for years ago, this Court stated, "[i]t is a matter of common sense that the proceedings of county commissions, for obvious reasons, are to be construed with less strictness than courts of formal record." Tug Valley Recovery Center, Inc. v. Mingo County Commission, 164 W.Va. 94, 112, 261 S.E.2d 165, 175 (1979). The parties can rely only on their notes and recollections as to what arguments were presented orally to the Board of Review and Equalization. The troubling issue raised by Appellants, however, is the suggestion that Purple Turtle Group "elected to file only the portion of the record the Property Owners presented, and excluded evidence presented by the Assessor." See Appellant's Brief p. 12. It is important to note, however, that the Court did not render judgment in favor of Purple Turtle Group until November 28, 2007. See Appendix for Civil Action No. O6-C-98, pp. 463-470). By that date, the entire written record that had been before the Board had, indisputably, been placed before the Court. Once Purple Turtle Group obtained the materials presented to the Board by the Assessor, it attached them as Exhibit D to its "Opposition to Motion to Dismiss and Opposition to Motion to Dismiss Appeal of their 2007 Assessments" served May 9, 2007, including the March 26, 2007 letter from the Assessor indicating

that the materials provided to Purple Turtle Group's counsel were those materials provided by the Assessor to the Board. See Appendix p. 131-236. Clearly, the Court had the record provided to the Board by the Assessor well before issuing its order in November, 2007.

The Assessor also complains that the Court made its decision based on information not provided to the Board. Much of the information provided to the Board was provided orally. Both parties are at a disadvantage given this fact, because they can neither prove nor disprove what was argued before the Board. The written information provided to the Board by Purple Turtle Group in 2006 encompassed the Complainants' Protest to the 2006 Assessment, a list of Lot Owners in Broomgrass Subdivision (attached as Exhibit "A" to that Protest) and the Appraisal Report and Valuation Analysis, as well as attached Addendums A-I to that Report (attached as Exhibit "B" to that Protest), all of which were attached to the Opposition to Appellee's Motion to Dismiss Appeal of the 2006 Tax Assessment, which contains Complainant's Protest to the 2006 Tax Assessment and the exhibits discussed (See Appendix for Civil Action No. 06-C-98, pp. 55-148). The Affidavit executed on March 3, 2006 by the appraiser John McClurg was, as the Assessor notes, an addition to the Complainant's Protest of the 2007 assessment. See Appendix for Civil Action No. 07-C-247, pp. 8-89. Mr. McClurg's Affidavit only reaffirmed that the conclusions contained in the Appraisal Report were true and accurate reflections of the market value of the lots at issue in this case and that the fair market value for these lots, as the Appraisal stated, was \$40,000.00 each. Id.

In his Appeal, the Assessor insists that he "argued before the Board of Equalization the point that the appraisal presented to the Board of Equalization in support of their protest of the assessments failed to meet the USPAP (Uniform Standards of Professional Appraisal Practice – "USPAP") standards and states that he "argued an appraisal can only be used for the purpose for which the appraisal was prepared." Appellant's Brief p. 16. Appellees contend, however, that it was not until the Assessor filed Respondent's Memorandum in Opposition to the Appellant's Motion for Summary Judgment that he argued that under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Uniform Standards of Professional Appraisal Practice are recognized as generally accepted appraisal standards and must be complied with by, among

others, appraisers and appraisal services. See Respondent's Memorandum in Opposition to Appellant's Motion for Summary Judgment, p. 4 (Appendix for Civ. Action No. 06-C-98, pp. 342-349). It is clear from the record that even the Assessor doesn't know whether he made the argument to the Board in 2006. For example, on page 1 of his "Rebuttal Memorandum to Petitioners'/Appellants' Reply Memorandum in Opposition to their Motion for Summary Judgment," served on August 22, 2007, he admitted that he did not know whether or not he had made any argument concerning USPAP standards at the Board's hearing on Purple Turtle Group's Protest of the 2006 tax assessments and stated that the "Petitioners have misstated material facts that where (sic) presented to the Board of Equalization by the Assessor in the 2007 appeal and possibly presented at the 2006 appeal." See Appendix for Civil Action No. 06-C-98, pp. 460-462. Given the Assessor's uncertainty about whether he made this argument before the Board in 2006, it is not beyond the realm of possibility that he is mistaken about whether he presented the argument to the Board in 2007 as well. It is abundantly clear from the written record, however, that the Assessor submitted no written documentation concerning USPAP standards to the Board.

Even if the Assessor's argument that the values attributed to the Petitioners' lots in the appraisal performed to determine the value of the conservation easement cannot be accepted as a true "appraisal" of the lots' values under USPAP standards, it does not naturally follow that Purple Turtle Group failed to present "any credible evidence to the value of the property." See Appellant's Brief p. 16. Appellees did not rely merely on the fact that the appraisal for the conservation easement included an appraisal value of \$40,000.00 for each of the one acre lots at issue. There were a number of "facts," not opinions or appraisals, contained in the Appraisal submitted to the Board upon which Purple Turtle Group relied - and these facts were wholly independent of the ultimate appraisal value ascribed to the lots at issue. For instance, pages 11-12 of the Appraisal, attached as Exhibit A to Petitioners'/Appellants' Motion for Summary Judgment and found in Appendix for Civil Action No. 06-C-98, pp. 205-278, demonstrated that a number of lots between 1.5 and 2.5 acres in size in the immediate area sold for prices between \$29,787.00 per acre to

\$45,000.00 per acre¹ - prices far more reflective of the true and actual value of the lots at issue given that they were in the same general district, and had similar topography, access to roads, schools, hospitals, shopping, and government services. *See also* pages 2-6 of the Appraisal as set forth in that same exhibit. The ultimate appraisal value of \$40,000 per lot provided in the Appraisals is unnecessary to see that the average price of similar lots was approximately \$40,000.00 but the Assessor never proffered any explanation for how those lots differ from the lots at issue except to say that Broomgrass is a "unique" neighborhood. The only feasible explanation that has been offered by any party is that proffered by the Appellees: the difference is explained by the fact that the purchase price of their individual lots encompassed more than the fair market value of the lots.

2. Purple Turtle Group Demonstrated that the Law's Requirements Concerning the Valuation and Taxation of Property Were Not Met.

Purple Turtle Group members do not deny the theoretical possibility that land values in an area could increase several hundred to many thousand percent in one year, but as they argued before the Board, they did not increase that much in this case. Instead, the assessments improperly gauged the fair market value of Purple Turtle Group members' one-acre lots based solely on the sales price, without considering evidence that the sales prices of those lots were inflated to cover the costs of farmland and developing that farmland. Here, Appellees are being taxed not only for the value of their lots, but for the value of farmland and its development included in the price of their lots - - and that farmland is also the subject of separate taxes that Appellees pay through their membership in the Broomgrass Community Association. Hence, Appellees are subject to double taxation, a point they raised from the very beginning. *See* Complainant's Protest to the 2006 Assessment, attached to Opposition to Appellee's Motion to Dismiss Appeal of the 2006 Tax Assessment, which contains Complainant's Protest to the 2006 Tax Assessment and the exhibits discussed (*See* Appendix for Civil Action No. 06-C-98, pp. 55-148). *See also* Complainant's Protest of the 2007 Assessment

¹ Although the appraisal of the buildable lots provided in the Appraisal performed for the conservation easement may not meet USPAP standards, there is absolutely no reason that the facts, rather than opinions, as to the value of the buildable lots provided in that appraisal may not be used. These facts formed part of the argument made by Purple Turtle Group and that they did not reassert them in other written documentation in the record does not make them any less true or reliable.

(Appendix for Civil Action No. 07-C-347, pp. 8-89). Additionally, the assessment failed to take into account the fact that some of the purchase price for the Appellees' lots was allocated to pay for items that are independently taxed, such as farm equipment.

In State v. Allen, 65 W.Va. 335, 64 S.E. 140 (1909), the sole syllabus point stated that "the state is not entitled to double taxes on the same land under the same title." Yet, charging Appellees taxes on farmland through the taxes on their individual lots and charging them taxes on the same farmland through the Broomgrass Community Association involves charging double taxes. The fact that Purple Turtle Group members were willing to pay one-time development and start up costs as part of the price for their own lots requires the conclusion that the price paid for their individual one-acre lots, more than half of which was to pay for agricultural assets and improvements on farmland now owned by Purple Turtle Group members, was not indicative of the true value of the lots themselves.

3. The West Virginia Constitution Requires that Taxation be "Equal and Uniform," That Taxes be Levied "in Proportion" to a Property's Value, and that the Value of Property Be Ascertained in Accordance with the Law.

As the Circuit Court found, Article 10, section 1 of the West Virginia Constitution provides that ". . . taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained and directed by law." As will be demonstrated below, the assessments of Purple Turtle Group members' property do not reflect appraisals in proportion to the value of the property nor the results of an equal and uniform process of appraisal.

The idea that assessments on property must be based on its value is a concept so fundamental that it is enshrined in the State's constitution. In fact, the writers of the West Virginia Constitution believed that ensuring that taxes would be fairly based on a piece of property's actual value was so important that they specifically stated that such value must "be ascertained and directed by law." Apparently, legislators recognized even at the earliest stages of West Virginia's

statehood that citizens needed to be protected against the dangers of overzealous taxation - - and there is no shortage of state laws outlining how to ensure fair and equitable taxation.

Article 10, section 1 of the West Virginia Constitution left the issue of how to ascertain the value of property to legislators. As the Circuit Court noted, West Virginia Code § 11-3-1 holds that "[a]ll property shall be assessed as of the first day of July at its 'true and actual value'; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owners thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale. . . ." Similarly, according to W. Va. Code § 11-1C-1 (a), "all property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly and no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county." "[T]he term 'value,' as used in article 10, section 1 of the West Virginia Constitution, means the 'worth of money' of a piece of property - its market value." *See In re 1975 Tax Assessments Against Oneida Coal Co.*, 178 W.Va. 485, 487-88, 360 S.E.2d 562-563 (1987), *quoting* syllabus point 3 of *Killen v. Logan County Commission*, 170 W.Va. 602, 295 S.E.2d 689 (1982). "True and actual value" means fair market value: what property would sell for if sold on the open market. *Eastern American Energy Corp. v. Thorn*, 189 W.Va. 75, 78, 428 S.E.2d 56, 59 (1993), *citing* *Kline v. McCloud*, 174 W.Va. 369, 372, 326 S.E.2d 715, 718 (1984). Hence, "determining 'true and actual value' is the first step in taxing real property." *Kline*, 174 W.Va. at 372.

4. The "True and Actual" or "Fair Market" Value of Property is Not Always Reflected in its Sale Price.

In this case, the Assessor used the average price paid for the one acre lots, \$192,000.00, as the gauge of their "true and actual" or "fair market" value. At first glance, the logic behind the Assessor's appraisal is understandable. After all, it has often been said that "as long as the property changes hands in an arm's length transaction, the price paid for the property is strongly indicative of its true and actual value." *See Thorn*, 189 W.Va. at 78. Yet, this Court has warned, and the Circuit

Court found, that the "price paid for property is not conclusive as to value. . . ." See Crouch v. County Court of Wyoming County, 116 W.Va. 476, 477, 181 S.E. 819, 819 (1935). Instead, "[i]n determining the fair market value of a piece of land, a county assessor must 'seek out all information which would enable him to properly fulfill his legal obligation.'" Kline, 174 W.Va. at 372, *quoting In Re Shonk Land Co.*, 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974).

In most instances, a seller wants to maximize price, while a buyer wants to minimize it. Therefore, it is well settled that a bona fide sale of property may be indicative of the true value of the property. Such a sale price, however, is not dispositive on the issue of value. There may be instances when the sale price may not reflect true value. Such was certainly the case here because the buyers of the property at issue were not interested in minimizing the price; they were committed to paying more than the fair market value of their respective lots in order to further a cause they believed in: the preservation of farmland and development of a working organic farm on land that was located in their subdivision, but which did not belong to them.

5. How Does West Virginia Ensure that the "True Value" of Property is Ascertained?

Just as many other states, West Virginia recognizes that the most recent sales price, even in an arms length transaction, is not always enough to allow an assessor to determine the true value of a piece of property. Hence, West Virginia law allows county assessors to consult a number of credible and reliable sources of information when assessing a piece of property. They can, for instance, consult a property owner's sworn valuation or an appraisal by a bona fide appraiser, in determining the assessed value of property. Kline, 174 W.Va. at 372, *citing Killen v. Logan County Comm'n*, 295 S.E.2d 689, 706 (1982). The assessment process developed by the legislature to ensure fair assessments, in fact, "contemplates a democratic method of assessment in which each property owner is an active participant." See Rose v. Fewell, 170 W.Va. 447, 449, 294 S.E.2d 434, 436 (1982).

In Administrative Notice 2006-16, which was presented by the Assessor to the Board when the Appellees' claims were being addressed, it was observed that the method by which county

appraisers appraise residential real estate statewide has been extended to include the use of real estate mass appraisal software called "Computer Assisted Mass Appraisal" or "CAMA." See Exhibit D to Opposition to Motion and Memorandum in Support of Appellant's Motion to Dismiss Appeal (Appendix for Civil Action No. 07-C-247, pp 132-134). The CAMA software allows the entry of data by the local Assessor concerning "comparable values" of land in particular "neighborhoods" in the county and then prices the value of this land on a "price per front foot" or by acreage. Local assessors divide their counties into "neighborhoods" giving consideration to similarities such as parcel size, roads, topography, costs, and type and quality of improvements for land pricing. The use of such software is apparently meant to better enable assessors to meet the requirements of West Virginia law and ensure that taxation is equal and uniform throughout the state and that all property is taxed in proportion to its true value.

Given the multiple legal and constitutional requirements that all tax assessments reflect fair appraisals and be based on a property's "true market value," it is not surprising that the State has never identified one single approach that must be used by assessors to gauge fair market value. Instead, the emphasis has always been on encouraging assessors to use whatever means necessary to enable true, fair market value assessments to be made. Appellees argued that when an assessor uses only one approach to determine the true, or "fair market" value of a piece of property, the likelihood that such an assessment will actually reflect the property's true value is largely dependent on whether the approach chosen utilizes a broad or narrow base of information. If the method chosen uses a broad base of information to determine property value, it is more likely to result in a fair assessment - - which is why computer programs designed to compare large numbers of lots with similar characteristics, such as the CAMA program, can be helpful. A method that uses a very narrow range of information is less likely to result in a proper valuation of a property's true value. Either approach, however, is acceptable - - as long as an assessor recognizes that the duty to reach a true and fair assessment of property remains, regardless of what approach is chosen. If an assessment results in values far higher than those placed on similar properties, an assessor has an

obligation to seek additional information to ensure that the assessment reflects both "equal and uniform taxation" and taxation "in proportion to the value of property."

Obviously, a great deal depends on how an assessor chooses to characterize information; a computer program that compares similar properties will be of no assistance if, based solely on the sales price of a lot, a piece of property or neighborhood is classified as being "unique" and unable to be compared to otherwise similar properties. Similarly, if an assessor uses the most recent sales price as the indicator of the true value of a piece of property, but fails to make any allowances when the price paid is specifically structured to cover more than the fair market value of that lot, the use of that sales price will be of little aid. As Purple Turtle Group members argued below, assessors are given discretion for a reason and if they fail to take advantage of it when the usual methods they rely on fail to account for unusual circumstances, they violate the letter and the spirit of the law designed to ensure fair and equal tax assessments. The motive behind utilizing the method of assessment chosen in this instance may have been pure, but the result has been anything but fair or reflective of the property's "true and actual value."

6. The Assessments Did Not Reflect the Lots' True, "Fair Market" Value and Violated West Virginia Law.

According to a letter from the Berkeley County Assessor's Office dated February 16, 2006, the one acre lots at issue were advertised on the open market for sale for prices ranging from \$175,000.00 to \$225,000.00 for a "1 acre lot with covenants and restrictions, amenities, and an interest in the common area of the remaining 304 acres that is receiving farm preservation. See Exhibit D to Opposition to Motion and Memorandum in Support of Appellant's Motion to Dismiss Appeal (Appendix for Civil Action No. 07-C-247, pp. 135-136).² The February 16, 2006 letter indicates that the 1 acre lots were appraised "based on the average sale price of \$192,000.00 and the

² This statement largely reflects the actual facts in this case, except that (a) one lot was never placed on the market, (b) two lots were sold at far less than the advertised price, though these sales were not "arms length" sales, and (c) the Appellees have not actually purchased an "interest" in the remaining 304 lots, though those lots are subject to farmland preservation and Appellees do have the right to engage in certain land use activities on them. Originally, plans for Broomgrass did anticipate that individual lot owners would become partial owners of the farm preserve, but ultimately, this did not happen.

remaining 304 acres are valued at a reduced farm agricultural price per acre." Id. The letter notes the concern of the Appellees that the appraisals of the one acre lots reflect a 300,000 % increase in market value, observing that in 2005, all the acreage was valued with farm rates at \$40,900.00 and that in 2006, the remaining farmland was valued at \$41,000.00. Id. The Assessor's letter, however, reflects the belief that there was no increase in the market value "because the lots created a new neighborhood for the 2006 tax year." Id. (emphasis added). Furthermore, that letter explains that "[b]ecause of its uniqueness, Broom Grass (sic) does not compare to other subdivisions, so we appraised them (the lots) at the market they created."

As previously noted, Purple Turtle Group members provided an appraisal by an independent appraiser, The Hawthorne Group, that had been performed in April, 2005 when the Berkeley County Farmland Protection Board sought an appraisal of the land that was then the subject of a possible conservation easement. See Exhibit B to Memorandum in Opposition to the Appellant's Memorandum in Opposition to Motion for Summary Judgment (Appendix for Civil Action No. 06-C-198, p. 368-420). The appraisal encompassed the 16 one acre lots at issue as well as the roughly 304 acres of farmland/ timberland. The appraisal recognized the difference in value between the 16 buildable lots and the land that was to be made subject to a conservation easement, finding that the value of the conservation easement was \$508,000.00. After the conservation easement was taken into account, the appraisal estimated the value of the farmland/ timberland to be \$1,600.00 per acre. The appraisal value of the 16 lots at issue provided in the appraisal was arrived at by using six sales of similar properties in the immediate area in the Gerrardstown District that had been sold in late 2004 and early 2005 as a basis of comparison. The sizes of the lots used for comparison purposes ranged from 1.62 to 2.5 acres. The unit prices for those lots ranged from \$29,787.00 to \$45,000.00 per acre and the unadjusted mean value per acre for the six sales was \$39,304.00 per acre. Id. Based on those six sales, the appraisal estimated the value of each of the 16 lots at issue to be approximately \$40,000.00 per lot.

Although the Assessor admitted he felt that Broomgrass was "unique," neither he nor the Board recognized that characterizing it (and therefore the Purple Turtle Group members' lots) that

way made it impossible to ascertain the lots' "true and actual" value. Once the price of the lots made them, and thus the Broomgrass neighborhood, "unique," the Broomgrass lots could be compared, even using the CAMA program, only to each other. Purple Turtle Group members not only submitted to the Board an appraisal that included appraisal values for their own lots (and, for the 2007 appeal, an Affidavit by the Appraiser who had performed the original appraisal confirming his opinion that the lots in question should be appraised at approximately \$40,000.00 each), that appraisal contained information about the assessed value of similar lots. Even if relying on the appraisal values given to Appellees lots through that appraisal is not deemed appropriate, there is no problem with relying on information contained (and considered) in that appraisal. The information contained in the appraisal demonstrated that the Appellees' lots were not in any way different from neighboring lots except that Appellees paid more for theirs because of their intention to cover the cost of preserving additional farmland and developing an organic farm. Even if the Board did not believe it appropriate to use the appraisal of Purple Turtle Group's lots provided in that appraisal, there is no reason that the information contained in that appraisal, and upon which it was based, could not be used.

Unfortunately, once the decision that Broomgrass was "unique" was made, a circular logic took hold that made any determination by the Assessor of the true market value of the sixteen buildable lots at Broomgrass impossible. Because Broomgrass was "unique," the Assessor decided, a new neighborhood needed to be created. Because a new "neighborhood" was created, the CAMA program to identify "comparable values" in the "neighborhood" was of no use because it could then only compare Broomgrass lots to other Broomgrass lots. As noted above, the purchase price of property in an arms length transaction is often a good indicator of its fair market value. In this instance, however, the reason that a county assessor should "seek out all information which [will] enable him to properly fulfill his legal obligation" is clear. See Kline, 174 W.Va. at 372, quoting In Re Shonk Land Co., 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974). Truly, as the Circuit Court found, sometimes the "price paid for property is not conclusive as to value. . . ." See Crouch v. County Court of Wyoming County, 116 W.Va. 476, 477, 181 S.E. 819, 819 (1935).

The Circuit Court recognized that what makes Broomgrass unique is the same thing that skewed the price paid for the lots: the willingness of its residents to spend far more than fair market value for their lots in order to protect property near their own and spend the money necessary to develop that property into a working organic farm. Purple Turtle Group members bought one acre lots that are not substantively different than many other one acre lots in the Gerrardstown district. The topography is similar, the location is similar, the access to roads is similar, and the opportunities and advantages offered by the surrounding area (schools, shopping, etc.) are the same. Some day in the future, the residents in Broomgrass may have access to a few amenities not presently available, such as a pool and an athletic field, but these amenities do not now exist and cannot begin to justify the difference in the assessment of Purple Turtle Group members' lots and similar properties in the Gerrardstown district, particularly since over half of the purchase price of the lots was allocated to be devoted to farmland not owned by Purple Turtle Group members.

Purple Turtle Group members argued that if the Assessor was going to classify property as "unique" and thereby forego the safeguards that programs like CAMA are meant to provide to ensure that property is fairly compared and assessed, then he had an obligation to seek out additional information to ensure that the fair market value of that property was determined and that the property was taxed in proportion to its actual value. *See* Article 10, section 1 of the West Virginia Constitution. Taxing the lots based on money paid to purchase or improve OTHER property, as at least over 54% of the purchase price of the lots was allocated to do, is a violation of the West Virginia Constitution because it is not taxing property in proportion to "its" value - - it is taxing it in proportion to its value PLUS the value of other property (other property that is taxed separately). Additionally, since over 54% of the purchase price for the lots was allocated to property not belonging to Appellees, the full purchase price obviously cannot be said to reflect the lots' "true and actual" or "fair market" value.

Moreover, taxing Purple Turtle Group members' property based solely on its purchase price, even though that purchase price covered more than the fair market value of the lot itself, directly conflicts with the requirements set forth in W. Va. Code § 11-1C-1 (a), which requires that "all

property in this state . . . be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly and no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county." As shown above, the appraisals on Purple Turtle Group members' lots were significantly overvalued not only in relation to their own true value, but also in relation to similar property within the county. There will always be some small differences in appraisals of similar lots; the fact that assessments cannot be a model of perfect equality is a recognized truth - - but not a reason to allow disparities such as the ones that exist in this case.

In Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336, 409 S.Ct. 633, 102 L.Ed.2d 688 (1989), assessment inequalities of only 8-35% between comparable properties were deemed problematic; it cannot be surprising that the Circuit Court found disparities of more than 100% between the assessed values of the 16 lots and the assessed value of similar properties to violate the law. Small disparities may be unavoidable in assessing similar properties, but glaring disparities like the assessments of Purple Turtle Group members' lots can, and should, be remedied, as the Circuit Court recognized.

Whether Broomgrass lots are "unique" or not, the Assessor's obligation is the same: he must ensure that the property is assessed by determining its "true and actual value." West Virginia Code § 11-3-1. He had an obligation, in determining the fair market value of the property, to "seek out all information which would enable him to property fulfill his legal obligation." Kline, 174 W.Va at 372, quoting In Re Shonk Land Co., 157 W.Va. 757, 761 204 S.E.2d 68, 71 (1974). He did not meet that obligation.

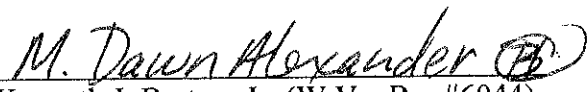
V. CONCLUSION

For the reasons discussed above, Purple Turtle Group believes that the failure to attach the record within thirty days was harmless error and that, because West Virginia Constitutional and statutory issues were before the Court, it was appropriate for it to employ a *de novo* standard of review to resolve those issues. To the extent that mere factual questions were presented to the Court, Appellees believe that the Circuit Court was required to employ the clear and convincing standard

of proof and that it did. In short, Appellees believe that the Circuit Court employed the correct standards of proof and pray that this Honorable Court will deny the Assessor's appeal and affirm the judgment of the Circuit Court.

PURPLE TURTLE, LLC, JOSEPH ATKINS AND
DANA GRABINER, MARY A. MELNYK, LINDA
A. LLOYD, RYAN MCCARTHY AND ERICA B
PATTHOFF, DAVID SPRINGER AND JUDITH
LEITNER SPRINGER, JOSEPH L. MCNAMARA
AND DONNA B. MCNAMARA, GWENDA A.
GLESMAN AND PAUL R. SCRIBNER, WILLIAM
W. DONAHOE AND WENDY JONES DONAHOE,
KENNETH R. RETZIG AND ELIZABETH D.
RETZIG, TIMOTHY D. REITZIG, TIMOTHY
YATES AND GENEVIEVE YATES,


By Counsel


Kenneth J. Barton, Jr. (W.Va. Bar #6044)
M. Dawn Alexander (W.Va. Bar #8722)
Steptoe & Johnson PLLC
1250 Edwin Miller Boulevard
Suite 300
P.O. Box 2629
Martinsburg, WV 25402-2629
(304) 263-6991

CERTIFICATE OF SERVICE

I hereby certify that on 7th day of November, 2008, I served the foregoing "*Appellees' Brief*" upon all persons and counsel of record, by delivering a true copy thereof via hand delivery, in an envelope addressed as follows:

Floyd M. Sayre, III
Bowles Rice McDavid Graff Love LLP
101 South Queen Street
Post Office Drawer 1419
Martinsburg, West Virginia 25402-1419
Counsel for Assessor Preston Gooden


Kenneth J. Barton, Jr.
M. Dawn Alexander